

From: Boyd, Andrew
Sent time: 01/25/2016 04:17:28 PM
To: Connery, Shannon
Subject: FW: FMC Revised Third Party Beneficiary Agreement - FMC FOIA
Attachments: FMC Third Party Beneficiary Agreement FMC OU RA-G_revisedAB.pdf

From: Boyd, Andrew
Sent: Monday, January 25, 2016 4:17 PM
To: 'Maureen Mitchell' <maureenm@SummitLaw.com>
Cc: David Heineck <davidh@SummitLaw.com>
Subject: RE: FMC Revised Third Party Beneficiary Agreement

Maureen – see attached for some suggested additions to the Agreement based on input we’ve received from the Tribes and input I’ve received from the program office. Let me know if you have any questions and whether the suggested changes are acceptable.

Thanks

Andy

Andrew Boyd

U.S. EPA, Region 10

Tel: (206) 553-1222

boyd.andrew@epa.gov

SENSITIVE COMMUNICATION INTENDED ONLY

FOR USE OF RECEIPIENTS NAMED ABOVE

From: Maureen Mitchell [<mailto:maureenm@SummitLaw.com>]
Sent: Friday, December 11, 2015 2:12 PM
To: Boyd, Andrew <Boyd.Andrew@epa.gov>
Cc: David Heineck <davidh@SummitLaw.com>
Subject: Revised Agreement

Andy,

Attached is a revised draft of the Agreement that we have referred to previously as a “Third Party Beneficiary Agreement”. This

version is intended to simplify the identification of the areas that will be used as part of the anticipated redevelopment. Instead of using a legal description, the revised Agreement references the Interim Record of Decision Amendment (IRODA) and incorporates the locations of RA-G and RA-J as described in the IRODA and Remedial Design Work Plan. A clean and redline version are attached to facilitate your review of the changes.

If satisfactory, please confirm EPA's approval of this Agreement so that we may proceed with having it signed. A copy of the fully executed Agreement will be provided to you.

Thank you,

Maureen

 **Maureen Mitchell** · *Partner*

206-676-7004

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----- Summit Law Group -----

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AGREEMENT

THIS AGREEMENT (“Agreement”) is made by and between **FMC CORPORATION**, a Delaware corporation (“**FMC**”), and Valley Agronomics, LLC, a Delaware limited liability company (“**Tenant**”) (together, the “**Parties**”).

RECITALS

A. FMC is the parent company of FMC Idaho LLC, which is the fee simple owner of certain property in Pocatello, Idaho known as the FMC Operable Unit (“**OU**”) of the Eastern Michaud Flats Superfund Site. The FMC OU is largely within the exterior boundary of the Fort Hall Indian Reservation of the Shoshone-Bannock Tribes (the “**Tribes**”).

B. The FMC OU is subject to a Unilateral Administrative Order for Remedial Design and Remedial Action having an effective date of June 20, 2013 that the U.S. Environmental Protection Agency (“**EPA**”) issued to FMC, EPA Docket No. CERCLA-10-2013-0116 (the “**UAO**”). The UAO directs FMC to perform the OU remedial action selected in the September 27, 2012 Interim Record of Decision Amendment (“**IRODA**”) for the FMC OU. The UAO and deliverables that FMC has provided to EPA under the UAO, including the FMC OU Remedial Design Work Plan dated December 2013 (the “**Work Plan**”), require FMC to perform remedial action at the FMC OU that in general consists of placing caps on contaminated soil areas and extracting and treating contaminated groundwater and placing the treated groundwater into infiltration or injection units to return the groundwater to the underlying aquifer. The required remedial action includes work within the areas subject to a prospective lease and easement from FMC to Tenant, encompassing portions of what the IRODA and Work Plan identify as Remediation Areas RA-G and RA-J (the “**Lease Area**”). The required remedial action work at RA-G includes, but is not limited to, grading for control and management of storm water runoff, installing a retention basin to hold storm water runoff, installing an extraction well field, and associated monitoring wells, potentially an injection system, and installing a cap to shield gamma radiation (“gamma cap”) (the “**RA-G Remedial Actions**”). In addition, a water treatment facility and necessary infrastructure may be located within RA-G. The required remedial action work at RA-J includes, but is not limited to, grading for control and management of stormwater runoff and removal of the upper six inches of soil (the “**RA-J Remedial Actions**”).

C. Tenant intends to lease from FMC certain air rights above portions of RA-G and RA-J (the “**Leased Premises**”), obtain an easement for property beneath and adjacent to the Leased Premises, and possibly obtain easements for access to other areas of the FMC OU as

needed to support its development and use of the Leased Premises. Tenant intends to use the Leased Premises to construct and operate a fertilizer, seed, and crop-protection formulation and distribution business, including retail sales. FMC and Tenant expect to enter into an Air Rights Lease Agreement (“**Air Lease**”) and Easement Agreement (“**Easement**”) under which Tenant will conduct operations at the Leased Premises. A Memo of Lease and the Easement Agreement will be recorded in the real property records of Power County, Idaho, the county in which the Lease Area is located.

D. The UAO and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq., under which the UAO was issued, provide EPA with authority to enforce the UAO and seek specific performance of its requirements. By executing this Agreement, the Parties make EPA an intended beneficiary of this Agreement with authority to enforce its terms and conditions.

NOW, THEREFORE, WITNESSETH in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, FMC and Tenant hereby agree that the above Recitals are incorporated into this Agreement and agree as follows:

AGREEMENT

1. **Definitions.** Defined terms shall have the meaning set forth in this Agreement. Any defined terms used but not defined in this Agreement shall have the meaning set forth in the UAO.
2. **Acknowledgement of Third-Party Beneficiary Status.** The Parties acknowledge and declare that it is their express intent that the covenants and obligations contained herein are not only for their benefit, but also for the benefit of EPA as an intended third-party beneficiary and as trustee for the Shoshone-Bannock Tribes. The Parties agree that while EPA is not acquiring an interest in real property, EPA may enforce this Agreement and the obligations contained herein in any manner permitted in law or equity, including through specific performance.
3. **No Other Third-Party Beneficiaries.** The provisions of this Agreement are solely for the benefit of FMC, Tenant, and EPA (including EPA in its role as trustee for the Shoshone-Bannock Tribes). Except for EPA as expressly provided herein, no other person, corporation, association, organization, governmental agency or entity, or any other form of entity or arrangement is a third-party beneficiary of this Agreement and no other entities have any authority to enforce or claim any benefit under this Agreement.
4. **No Unacceptable Risk to Human Health or to the Environment.** As set forth in UAO Paragraph 46.b, Tenant agrees that it shall not use the Leased Premises or any other portion of the FMC OU in any manner that EPA determines will pose an unacceptable risk to human

health or to the environment due to exposure to Waste Material or interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial action work required under the UAO, including but not limited to the water treatment facility and necessary infrastructure that may be located within RA-G.

5. **Access and Institutional Controls.** Section XIII of the UAO, entitled “Access and Institutional Controls,” requires FMC to provide access to the FMC OU to EPA and, when accompanied by EPA, representatives of the State of Idaho and the Tribes for the purposes enumerated in that Section. After the Parties execute the Air Lease and Easement, Tenant agrees that consistent with UAO Section XIII it shall provide EPA, including its authorized representatives, and representatives of the State of Idaho and the Tribes when accompanied by EPA, with access to the Leased Premises (and any other areas of the FMC OU for which FMC may grant Tenant an easement, lease or other property right) to conduct any activity regarding the UAO, including but not limited to the following activities:
- (1) Monitoring the FMC OU remedial action Work as that term is defined at UAO Paragraph 6.gg;
 - (2) Verifying any data or information submitted to EPA;
 - (3) Conducting investigations regarding contamination at or near the FMC OU;
 - (4) Obtaining samples;
 - (5) Assessing the need for, planning, or implementing additional response actions at or near the FMC OU;
 - (6) Assessing implementation of quality assurance and quality control practices;
 - (7) Implementing the Work pursuant to the conditions set forth in UAO Section XXIII (Enforcement / Work Takeover);
 - (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by FMC or its agents, consistent with UAO Section XIV (Access to Information);
 - (9) Assessing FMC’s compliance with the Order;
 - (10) Determining whether the FMC OU or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the UAO; and
 - (11) Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls and the requirements of the ICIAP as that term is defined at UAO Paragraph 6.i.
6. **Institutional Controls and Proprietary Controls.** The UAO requires FMC to record Proprietary Controls on the real property, pursuant to UAO Paragraph 46.c. FMC remains responsible for developing and recording such Proprietary Controls. Tenant acknowledges that its use of the FMC OU, including the Leased Premises, is subordinate to the Institutional Controls and Proprietary Controls currently in effect and that may be required or recorded pursuant to UAO requirements subsequent to the Effective Date of this Agreement.

- 7. **EPA Approval of this Agreement.** The Parties acknowledge that EPA must review and approve this Agreement in writing prior to execution of the proposed Air Lease and Easement.
- 8. **No Waiver.** No failure by FMC or EPA to insist upon the performance of any term, covenant or condition of this Agreement or to exercise any right or remedy consequent upon a default hereunder will constitute a waiver of any such default or of such term, covenant or condition. No waiver of any default will affect or alter this Agreement, but each and every term, covenant and condition of this Agreement will continue in full force and effect with respect to any other then-existing or subsequent default hereunder.
- 9. **Applicable Law.** This Agreement is made pursuant to, and will be construed and enforced in accordance with, the laws in force in the State of Idaho. All provisions of this Agreement will be construed as “conditions” and “covenants” as though language specifically expressing or imposing covenants and conditions were used in each separate provision of this Agreement.
- 10. **Effective Date.** The Effective Date of this Agreement is the date both Parties have signed this Agreement as indicated below.

IN WITNESS WHEREOF, FMC and Tenant have caused this Agreement to be executed as of the Effective Date.

FMC CORPORATION
a Delaware corporation

By: _____
Name:
Title:
Date:

VALLEY AGRONOMICS, LLC

a Delaware limited liability company

By: _____
Name:
Title:
Date:

